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No. 80-2205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORGAN M. FINLEY, Clerk of the Circuit Court of Cook County, Illinois,

Petitioner,

vs.

TONI MURRAY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED JUNE 29, 1981
CERTIORARI GRANTED NOVEMBER 2, 1981

QUESTION PRESENTED

Whether absolute judicial immunity shields the Clerk of the Circuit Court of Cook County from §1983 damages liability when performing judicial or quasi-judicial functions.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

ABSOLUTE JUDICIAL IMMUNITY SHIELDS THE CLERK OF THE CIRCUIT COURT OF COOK COUNTY FROM §1983 DAMAGES LIABILITY WHEN THE CLERK PERFORMS JUDICIAL OR QUASI-JUDICIAL FUNCTIONS.

A.

The Petitioner Is An Essential Officer Of The Court Who Enables The Court To Properly Perform Its Judicial Duties.

(Reply to Respondent's Argument I)

Petitioner argued in his brief that the clerk of the court enjoys absolute judicial immunity from §1983 damages liability when performing judicial or quasi-

judicial functions. Respondent has utterly failed to address the question raised by petitioner, the question upon which certiorari was granted by this Honorable Court. Instead, Respondent has argued throughout her brief, without support, that the clerk of the court is an executive official who either enjoys no absolute executive official immunity, or, at most, a qualified official immunity. Her response totally ignores the functions of the clerk of the court as those quasi-judicial functions relate to the judiciary in the context of judicial immunity.

Respondent bases her entire argument on the false premise that the clerk of the court is a member of the executive branch of government. Respondent provides absolutely no support for her assertion that the clerk is an executive official and ignores the test for judicial immunity enunciated by this Court in *Dennis v. Sparks*, 449 U.S. 24, 30 (1980). This Court held in *Dennis* that in order for petitioner to assert that he enjoys absolute judicial immunity, petitioner must establish that he "was actually performing a judicial act or was in any sense an official aide of the judge . . . in order that judicial duties may be properly accomplished." Respondent's analysis has completely ignored this Court's previous holding that the clerk of the court is a judicial officer (*Shadwick v. City of Tampa*, 407 U.S. 345 (1972)) and not an executive or legislative officer (Pet. Br. at 17-18), and thus, in every sense, is an official aide of the judge. See, *Dennis, supra.*

Petitioner has argued that the clerk of the court was historically part of the judicial branch of government in Illinois. (Pet. Br. 17) Since the filing of Petitioner's and Respondent's briefs in this cause the Illinois Supreme Court decided *Drury v. The County of McLean*, ... Ill. 2d ..... (Docket No. 54591, March 16, 1982). In *Drury*, the Illinois Supreme Court held:

> Under our constitution of 1970 the clerks of the circuit courts in this State are not county officials, but are non-judicial members of the judicial branch of State government. (Appendix A, p. 2a) . . . Under our present constitution, article VI, section 18(b), is substantially the same as article VI, section 20, of the 1870 Constitution as amended. (Appendix A, p. 4a)

Thus, the law is settled in Illinois that the clerk of the court is part of the judicial branch of government.

Amicus Curiae contend that petitioner is not a member of the judicial branch because "[h]e is an elected public official, with clear statutory duties . . . , answerable ultimately to the public . . . [and thus is] independent of any judge." (*Amicus* Br. at 11-12) This contention was recently rejected by the Illinois Supreme Court in *Drury, supra*, and was overwhelmingly rejected by this Court in *Shadwick v. City of Tampa*, 407 U.S. 345, 351 (1972) as follows:

> The municipal court clerk is assigned not to the police or prosecutor but to the municipal court judge for whom he does much of his work. In this sense, he may well be termed a "judicial officer." While a statutorily specified term of office and appointment by someone other than "an executive authority" might be desirable, the absence of such features is hardly disqualifying. Judges themselves take office under differing circumstances. Some are appointed, but many are elected by legislative bodies or by the people. Many enjoy but limited terms and are subject to re-appointment or re-election. Most depend for their salary level upon the legislative branch. We will not elevate requirements for the independence of a municipal clerk to a level higher than that prevailing with respect to many judges. The clerk's neutrality has not been impeached: he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

Similarly, in the instant case, Petitioner's neutrality has not been impeached. The complaint is devoid of any allegations that Petitioner's duties included directing or supervising Respondent's arrest. No allegation has been made that Petitioner arrested Respondent. It is obvious that Petitioner is a member of the judicial branch of government.

Petitioner is not only a member of the judicial branch of government but has in all respects, in this case, functioned as an official aide of the court in order that judicial duties may be properly accomplished. In this case the Petitioner performed the quasi-judicial function of creating, devising and implementing warrant recall procedures in order that Presiding Judge Wachowski's General Order 74-8 (M), as well as the warrant recall orders of the circuit court judges, may be properly accomplished.

Respondent acknowledges that Petitioner's function, in addition to his status in the court system, determines whether Petitioner enjoys absolute judicial immunity. (Resp. Br. i, 47) However, although respondent acknowledges the "undeniable necessity of [the court clerk's] function . . . [as being] essential to the judicial process," (Resp. Br. at 31) respondent never addresses the issue of whether the court clerk's admitted quasi-judicial functions within the court system entitle him to judicial or quasi-judicial immunity. See *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D. N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). Instead, respondent and *amicus* argue, in the alternative, that petitioner enjoys no immunity when performing ministerial duties or antipodal discretionary-ministerial duties, (Resp. Br. at 3, 11, 16, 22, 24-25, 45), qualified executive official immunity when performing discretionary duties (Resp. Br. at 3, 6, 17, 31, 35) and absolute judicial immunity

when performing judicial or quasi-judicial functions. (Resp. Br. at 25, 35, 40-46) (*Amicus* Br. at 8).

However, as previously established, Petitioner is a member of the judicial branch of government not the executive branch. The uncontroverted facts in this case established through affidavits and exhibits that Petitioner is a member of the judicial branch who functions as an official aide to the judge in order that judicial duties may be properly accomplished. The uncontroverted affidavits and exhibits before the District Court clearly establish that Petitioner was not functioning as an executive within the court system. (J.A. at 16-24) (Pet. Cert. App. B at 17a) Therefore, respondent's attempt to apply any test for executive immunity has absolutely no relevance to the facts in the case at bar and must be rejected. Respondent has cited no authority of this Court that judicial immunity must be determined by the ministerial or discretionary nature of the judicial or quasi-judicial function. Judicial and quasi-judicial functions include both ministerial and discretionary duties performed by judges and court clerks. Neither duty is relevant to a discussion of judicial immunity. Respondent incongruously argues that court clerks are liable for performance of ministerial duties, yet admittedly immune when acting without discretion pursuant to court orders. (Resp. Br. 3, 25 n. 25) Judicial immunity for court clerks does not depend on a distinction between ministerial and discretionary duties but rather depends on whether or not the clerk performed quasi-judicial functions in order that the court may properly accomplish its judicial duties.

In the instant case, Petitioner, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, Illinois, enjoys absolute judicial or quasi-judicial immunity for doing his job as "an arm of the judge" (Resp. Br. at 43) by creating warrant recall procedures in order that

Judge Wachowski's General Order 74-8(M) may be properly implemented. Petitioner's deputy clerks similarly enjoy absolute judicial or quasi-judicial immunity when performing their duties in order that Judge Wachowski's General Order 74-8(M) and each individual judge's warrant recall orders (here Judge Goldstein's order) may be properly implemented.

B.

Historical And Public Policy Considerations Are The Foundation For Petitioner's Absolute Immunity From §1983 Damages Liability.

(Reply to Respondent's Argument II. and III.A., B.1. and 2.)

In arguing that there is no basis in the common law for the immunity of the court clerk, respondent has totally ignored this Court's previous holdings in *Dennis v. Sparks*, 449 U.S. 24 (1980), *Bradley v. Fisher*, 80 U.S. 646 (13 Wall. 335) (1872), and *Pierson v. Ray*, 386 U.S. 547 (1967). In *Bradley v. Fisher, supra*, this Court held that at common law judges were immune from damages liability. In *Pierson v. Ray*, 386 U.S. 547 (1967), this Court held that judges were immune from damages liability under §1983 and recognized that, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Id.* at 553-554. In *Dennis v. Sparks, supra*, this Court further explained its previous holdings by stating that if a person "was actually performing a judicial act or was in any sense an offical aide of the judge . . . in order that judicial duties may be properly accomplished," then the judge's absolute immunity would also cloak that person. *Dennis, supra*, 449 U.S. at 30.

Respondent contends that court clerks enjoyed no common law immunity because they performed ministerial duties. In contrast, however, courts historically found the clerk immune from liability when he functioned as an official aide of the court and performed quasi-judicial functions pursuant to court order or decree in order that judicial duties could properly be accomplished. These courts so held without regard to the ministerial nature of the acts. *Davidson v. Wiley Bank and Company*, 31 Ala. (Book 25) 452 (1858); *Hoeffner v. Stratton*, 57 Me. 360, 362 (1869); and *Commonwealth v. Thompson*, 65 Ky. (2 Bush) 559 (1866). Respondent concedes that if the court clerk "was actually carrying out a court order" (Resp. Br. at 19) this quasi-judicial function was a "defense at common law" (Resp. Br. at 19) to a cause of action against the court clerk.

In support of respondent's argument that court clerks enjoyed no immunity because they performed ministerial duties, respondent relies heavily on this Court's early cases concerning damages liability against municipalities and executive county officials. Respondent has cited *Amy v. Supervisors* (sub nom. *Amy v. Barkholder*) 78 U.S. 136 (1871) (Resp. Br. at 12), as the leading common law authority that court clerks were liable in damages for their failure to perform ministerial duties. However, the defendants in *Amy* were Des Moines County Supervisors, not court clerks. The *Amy* decision, therefore, is inapposite to the case at bar because the Clerk of the Circuit Court of Cook County, Illinois, was historically an official in the judicial branch of government not an executive county official. See *Drury v. The County of McLean, supra*, ... Ill. 2d ..... (Docket No. 54591, March 16, 1982). (Appendix A, pp. 1a-10a)

Respondent's reliance on *Marsh v. The Board of Supervisors of Fulton County*, 77 U.S. 676 (1870), is sim-

ilarly misplaced. (Resp. Br. at 13) In *Marsh*, the defendants were the Board of Supervisors of Fulton County not the court clerk. The cause of action in *Marsh* was based on the conduct of the court clerk in his capacity as county clerk not in his capacity as court clerk. Therefore, *Marsh* fails to support respondent's argument that the court clerks were liable for their failure to perform ministerial duties. The court clerk in *Marsh* was an executive county official answerable to the Board of Supervisors, not the county court. Unlike Petitioner, the county clerk was not acting as an official aide to the court.

Respondent also relies on *Johnston v. District of Columbia*, 118 U.S. 19 (1886), in support of her contention that petitioner deserves no immunity for improper performance of ministerial duties. However, *Johnston* involves municipal liability, not the liability of an official aide to the judge, such as Petitioner. Therefore, this case provides no common law support for Respondent's argument.

In *Ex Parte Virginia*, 100 U.S. 339, 348 (1879), cited by Respondent (Resp. Br. at 18), this Court held that a state court judge acted in the clear absence of his jurisdiction, in direct violation of a statute and outside the scope of his authority, when he excluded black men from juries on the basis of race. Contrary to Respondent's contention (Resp. Br. at 18), *Ex Parte Virginia* provides no support for her argument. *Ex Parte Virginia* was not a civil damages suit against a judge but rather a *mandamus* action. Furthermore, Respondent is manifestly incorrect when she states that her complaint "has alleged that petitioner acted contrary to court orders both to recall the warrant for respondent's arrest and to implement adequate procedures" to do so. (Resp. Br. at 18) The complaint admits that Peti-

tioner acted within the scope of his authority by "defining and instituting effective practices and procedures to insure that the recall of an arrest warrant is communicated" to the Chicago Police Department. (J.A. 5) Nowhere in the complaint does Respondent allege that Petitioner acted in direct violation of any court order or outside the scope of his authority.

Furthermore, the Seventh Circuit Court of Appeals in *Brown v. Dunne*, 409 F. 2d 341, 349 (7th Cir. 1969), recognized that judicial immunity for court clerks transcended labelling the clerk's duties as ministerial in order to fix liability. In *Brown*, the Seventh Circuit held:

> But if the term ministerial is used as the Court in *Ex Parte Virginia*, 100 U.S. 339, 348, 25 L.Ed. 676 (1879) used it, it is plain that the charges [of mere errors or irregularities] against the judge, magistrate and clerks comprehend judicial rather than ministerial functions and therefore, do not remove their official immunity.

Moreover, the cases of *Hicks v. Dorn*, 42 N.Y. 47 (1870), *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1865), *McCord v. High*, 24 Iowa 336 (1868) and *Owen v. City of Independence*, 445 U.S. 622 (1980), cited by respondent, do not support her argument because all of these cases deal with the liability of executive officials and municipalities rather than clerks who act as official aides to the judge in order that judicial duties may be properly accomplished.

This Court in *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 452 (1981), recognized that the court system today is laboring under "unprecedented strains." The clerk of the court, today more than ever before, as an arm of the court, is responsible for keeping the judicial machinery functioning. This Court recognized the neces-

sary functions of the clerk as aide to the judge in *Ex Parte Morgan*, 114 U.S. 174 (1885). Certainly, there were compelling reasons to find that the clerk was immune from damages liability at common law and those reasons, are even more compelling today.

Fear of §1983 suits will neither prevent a court clerk, like petitioner, from creating imperfect court procedures nor deter a deputy clerk from inadvertently misplacing one in a thousand court files. Instead, fear of §1983 liability will deter court clerks like petitioner from performing their essential quasi-judicial functions in the court system. Fear of removal from office, accountability to the judge to whom the clerk is answerable, fear of state and federal criminal prosecution and fear of state civil damages liability more than sufficiently keep court clerks' conduct in check. If this Honorable Court refuses to extend absolute judicial immunity to court clerks, federal court dockets will be flooded with §1983 suits against court clerks, with allegations from losing a court file to creating inadequate court procedures designed to alleviate the stress on the judicial process buckling under unprecedented strains. Absolute judicial immunity promotes fairness to court clerks who otherwise would be sued instead of their immune judges who they serve, when clerks perform their quasi-judicial functions of implementing court orders. *McCray v. Maryland*, 456 F.2d 1, 5 n.11 (4th Cir. 1972). Absolute judicial immunity will prevent the federal judicial process from being disrupted by a predictable flood of §1983 litigation against court clerks and will prevent the state judicial process from being disrupted by overburdened court clerks inhibited from performing their numerous judicial and quasi-judicial functions in the ever-expanding state court system.

C.

Petitioner's Absolute Judicial Immunity From §1983 Liability Is The Majority Rule Followed By The Circuit Courts of Appeals.

(Reply to Respondent's Argument IV)

Despite the argument advanced by respondent, all of the modern federal cases cited by petitioner are still authority in support of the clerk's judicial immunity.

Respondent contends that the First Circuit recognizes absolute judicial immunity for court clerks only when they act in a non-routine manner under explicit court direction. (Resp. Br. at 43) Respondent fails to mention that the First Circuit in addition to relying on *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980), relied on its own holding in *Slotnick v. Stavisky*, 560 F.2d 31 (1st Cir. 1977) in which the court held that the clerk of the court enjoyed absolute judicial immunity when performing judicial or quasi-judicial functions.

With respect to the Second Circuit respondent cannot point to any case which overrules the holding in *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D. N.Y. 1973), *aff'd on other grounds*, 489 F.2d 488 (2d Cir. 1973). At most *Marty's Adult World of New Britain, Inc. v. Guida*, 453 F.Supp. 810 (D. Conn. 1978) cited by respondent, recognized a split in the Circuits over the issue of court clerk immunity and that this Court "has not yet had occasion to address this issue." *Id.* at 815. Furthermore, it is unclear from the facts in *Marty's Adult World* whether the tasks required of the clerk were quasi-judicial functions performed in order that judicial duties may be properly accomplished.

Respondent contends that the rule of *Smith v. Rosenbaum*, 460 F.2d 1019 (3d Cir. 1972) no longer has vitality in the Third Circuit. In making this statement she relies

solely on district court cases. She cannot point to any decision of the Third Circuit which overrules *Smith*.

Despite respondent's reliance on *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972) and her attempt to show that the holding undercuts petitioner's argument, *McCray* clearly supports petitioner's argument that a court clerk is absolutely immune from liability when he acts as an official aide of the judge in order that the court's judicial duties may be properly accomplished. See *Dennis v. Sparks*, *supra*. The factual situation in *McCray* is totally inapposite to the facts in the instant case. In *McCray*, the undisputed allegation made at the initial pleading stage was that the defendant clerk impeded the filing of plaintiff's papers. It is undisputed however that in the instant case the clerk was following required court-ordered procedures. Moreover, *McCray* clearly holds that if a "clerk has a defense that he was acting pursuant to his lawful authority or following an order of the Court, that defense must be raised and established before the complaint can properly be dismissed or judgment entered for the defendant." *Id.* at 5. In fact, in the instant case petitioner asserted both of these defenses in a motion to dismiss and/or for summary judgment which was supported by uncontroverted affidavits and exhibits in the District Court below. (J.A. 16-24, 31) Moreover, although it is petitioner's contention that *McCray* was improperly decided on the basis that the holding rested on a ministerial-discretionary test for judicial immunity for court clerks, the opinion, nevertheless, recognized that court clerks are immune when as official aides of the judge they act in a manner such that judicial duties may be properly accomplished. *Id.* at 5.

Although respondent contends that petitioner does not enjoy absolute judicial immunity in this case, she relies on *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980) and

Tarter v. Hury, 646 F.2d 1010 (5th Cir. 1981) for support. However, both cases clearly hold that court clerks like petitioner enjoy "absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's direction." *Tarter, supra*, 646 F.2d at 1013.

Respondent contends *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973) supports only a qualified immunity for court clerks. (Resp. Br. at 44, 46 n. 20) Yet, the Sixth Circuit's recent opinion, *Thompson v. Woltenberg*, 665 F.2d 1047 (6th Cir. 1981), pet. cert. pending, 50 U.S.L.W. 3720, (unpublished opinion) (see Appendix B, pp. 11a-12a), relied on *Denman* and held that "it is well established that an individual performing a ministerial duty at the direction of a judge acting in an official capacity is immune from suit." (Appendix B, p. 12a)

The Eighth Circuit case of *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974) cited by respondent for the proposition that *Davis v. McAteer*, 431 F.2d 81 (8th Cir. 1970) is no longer the law in that Circuit, is not apposite. *McLallen* was a case in which a court reporter was sued, not the court clerk. *McLallen*'s reference to court clerks was *dicta*, and the opinion nowhere cites to *Davis*. Furthermore, the Fifth Circuit recognizes the continued vitality of *Davis* in *Williams v. Wood, supra*, 612 F.2d at 985 n. 4.

Henricksen v. Bentley, 644 F.2d 852 (10th Cir. 1981), cited by respondent as support for her argument (Resp. Br. at 40), actually supports petitioner. The Tenth Circuit recognized that the court clerk enjoyed absolute judicial immunity "where performance of judicial acts or activity as an official aide of the judge is involved. *Dennis v. Sparks*, ... U.S. ....., 101 S.Ct. 183, 66 L.Ed. 185 (1980)." *Henricksen* recognized that

Denman v. Leedy, supra, and *Smith v. Rosenbaum, supra,* held that "clerks of courts have been ruled immune to suit under §1983 when performing 'quasi-judicial' duties." *Henricksen,* 644 F.2d at 855. Therefore, it is clear that all of the cases cited by petitioner demonstrate that petitioner enjoys judicial immunity as an official aide of the court in order that judicial duties may be properly accomplished.

D.

Available Alternatives To §1983 Liability For Clerks Of The Court Provide Superior Methods For Insuring That The Public Is Able To Remedy A Court Clerk's Misconduct.

(Reply to Respondent's Argument III. B. 3)

Respondent contends that no alternative remedies to a §1983 damages action justify the grant of absolute immunity to petitioner. (Resp. Br. at 37) Yet, respondent admits that there are statutory and common law bases for alternative criminal and civil remedies available to her in state court. (Resp. Br. at 7 n.3)

Respondent cites *People v. Gill,* 30 Ill. App. 2d 32 (1st Dist. 1961), a case which upheld indictments against the defendant, the Clerk of the Municipal Court of Chicago, who was indicted for palpable omission of duties imposed upon him by Illinois statutes. *Gill* makes clear that the court clerk is subject to criminal liability for palpable omissions of duty. Ill. Rev. Stat. 1959, ch. 38, §449. The criminal felony statute under which Gill was indicted remains viable as Ill. Rev. Stat. 1973, ch. 38, sec. 33-3, and was in effect at the time of respondent's arrest. In addition to approving criminal penalties against the court clerk, the Court in *Gill,* as Respondent points out, held that Illinois Revised Statutes, 1959, Chapter 25 "section 10 makes the clerk civilly responsi-

ble for the acts of his deputies and makes him answerable to his own court for their acts . . ." *Id.* at 51. Additionally, as in a §1983 action, in Illinois, Respondent would be entitled to a jury trial in a suit for damages against the court clerk. Ill. Const. Art. I, §13; Ill. Rev. Stat. 1979, ch. 110, §64. Therefore, in addition to the remedies discussed in petitioner's brief (Pet. Br. at 32-33), respondent concedes that the above civil and criminal remedies in state court were available to vindicate her private rights.

E.

The District Court Properly Granted Summary Judgment For The Petitioner Where No Genuine Issue Of Material Fact Existed That The Petitioner Enjoyed Absolute Judicial Immunity.

(Reply to Respondent's Issue V)

Respondent contends that the question of petitioner's judicial immunity could not have properly been resolved on the basis of petitioner's summary judgment motion. (Resp. Br. 51) Respondent contends that this question was not presented to the District Court and that further discovery is necessary to determine petitioner's judicial immunity. These contentions are without factual or legal support. Petitioner raised and briefed the issue of his absolute judicial immunity from §1983 damages liability both in the United States District Court for the Northern District of Illinois, and in the Seventh Circuit Court of Appeals. (Pet. Cert. App. A at 5a n. 4, 6a-7a.)

Moreover, no further discovery is necessary in the District Court below to determine whether petitioner failed to implement warrant recall procedures. (Resp. Br. at 8) Respondent ignores Petitioner's uncontroverted affidavits and exhibits submitted in the District Court below (Pet. Cert. App. B. at 19a) which establish that Petitioner

implemented warrant recall procedures on the very same day that Judge Wachowski entered General Order 74-8(M). (J.A. 19-21, 23-24) Furthermore, the uncontroverted affidavit of Deputy Clerk McNicholas (J.A. 21-22), who respondent has never named as a defendant, and respondent's warrant recall order (J.A. 18), conclusively established that petitioner's warrant recall procedures were in effect and implemented by Deputy Clerk McNicholas in respondent's criminal case.

Respondent and *Amicus* both contend that the dismissal of the Petitioner will deprive Respondent of her right to discovery. Both Respondent and *Amicus* fail to mention that this case is still pending in the District Court where one municipal defendant, the City of Chicago, and five individual defendants, Chicago Police Officers, are still party defendants. Therefore, discovery to determine the remaining defendants' liability for their alleged unconstitutional conduct is still available to Respondent. No discovery is necessary to determine whether Petitioner directed or supervised the Respondent's arrest because there are no allegations made in the complaint that Petitioner had anything whatsoever to do with Respondent's arrest.

No genuine issue of material fact exists that petitioner was an official aide of the court when he created warrant recall procedures in order that General Order 74-8(M) may be properly accomplished. Fed. R. Civ. P. 56(e). (J.A. 19-20) Clearly, the uncontroverted affidavits and exhibits established that Petitioner was entitled to summary judgment on the basis of judicial immunity as a matter of law.

Respondent and *Amicus* both contend that Petitioner can be held liable for the acts of his deputies under the theory of *respondeat superior*. (Resp. Br. at 7, n. 3, 26;

Amicus Br. at 12) This theory of liability has consistently been rejected by this Court in decisions ignored both by Respondent and *Amicus*. In *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 453 (1981) this Court held:

> Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). To the extent that Dodson's claims rest on this basis, they fail to present a federal claim.

Amicus and Respondent both contend that Petitioner is liable for failing to properly perform his supervisory responsibilities. (Resp. Br. at 26; *Amicus* Br. at 12) In so arguing both Respondent and *Amicus* again ignore this Court's recent decision in *Polk County v. Dodson*, ... U.S. ....., 102 S.Ct. 445, 454 (1981), reaffirming the viability of *Rizzo v. Goode*, 423 U.S. 362 (1976) and *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that a "general allegation of administrative negligence fails to state a constitutional claim cognizable under Sec. 1983." Furthermore, contrary to *Amicus'* contention, (*Amicus* at 12) Petitioner cannot be held liable under §1983 for a failure to properly perform his supervisory responsibilities where Respondent never specifically alleged anywhere in the complaint that Petitioner failed to adequately train or supervise his deputy clerks. (J.A. 2-11) Moreover, nowhere in Respondent's complaint does there appear the bald allegation made here for the first time that petitioner's procedures for sorting and delivering warrant recall orders were of a "haphazard nature." (Resp. Br. at 2) Respondent only pled her one isolated incident in her complaint and petitioner in response is not required to plead the absence of other incidents in order to establish that no custom or policy exists. *Monell, supra.* Therefore, the District

Court not only properly granted summary judgment, but could have properly granted summary judgment for petitioner on the basis of judicial immunity or in the alternative could have granted petitioner's motion to dismiss on the grounds that the complaint failed to state a cause of action under *Polk County v. Dodson, supra.*

CONCLUSION

For the foregoing reasons, Morgan M. Finley, the Clerk of the Circuit Court of Cook County, respectfully submits that this Court should reverse the judgment of the Seventh Circuit Court of Appeals, should uphold the order of the District Court granting summary judgment for the petitioner, and hold that the petitioner is entitled to absolute judicial immunity.

Respectfully submitted,

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